90-1161

FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.: _____

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1990

THOMAS D. SIKES

Petitioner/Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent/Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ALVIN E. ENTIN, ESQ.
2450 N.E. Miami Gardens Drive
Second Floor
Miami, Florida 33180
(305) 932-0550

Counsel for the Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's allowing the introduction at trial of evidence of criminal behavior on the part of the Petitioner for which he had received transactional immunity is in direct conflict with Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972), Brown v. Walker, 161 U.S. 591, 40 L.Ed. 819, 16 S.Ct. 644 (1896), and Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

2. Whether the decision of the Eleventh Circuit Court of Appeals affirming the district court's allowing the introduction at trial of evidence of criminal behavior on the part of the Petitioner for which he had received transactional immunity is in direct

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conflict with Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1970),

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LIST OF INTERESTED PARTIES

TRIAL JUDGE	**Kenneth L. Ryskamp**
PETITIONER	**Thomas D. Sikes**
UNITED STATES OF AMERICA	**Eileen O'Connor Assistant United States Attorney**
ATTORNEY FOR PETITIONER	**Alvin E. Entin, Esq.**
ALLEGED VICTIMS	**None**

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The Petitioner, THOMAS D. SIKES, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

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OPINIONS BELOW

The Judgment of the District Court is reprinted herein. (App. 1-5). The district court's ruling on the Petitioner's Sealed Motion to Dismiss, and its Findings of Fact and Conclusions of Law were made orally. The opinion of the Court of Appeals for the Eleventh Circuit affirming the Judgment of the District Court in United States v. Weaver, 905 F.2d 1466 (11th Cir.1990), was rendered on July 13, 1990, and is reprinted herein. (App. 5-42). The Order denying Petitioner's timely-filed Petition for Rehearing was rendered by the Court on September 6, 1990, and is reprinted herein. (App. 42-43). The Mandate issued on September 17, 1990, with the Opinion.

JURISDICTION

This petition arose in the first instance from criminal charges filed in the District Court for the Southern

District of Florida. The Judgment in a Criminal Case rendered by the Court (App. 1-5) was appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to the jurisdiction vested in the Court by 28 U.S.C. 1291.

This court has jurisdiction over this petition pursuant to 28 U.S.C. 1254.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Constitution of the United States, Amendment V

No person shall be shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against

district of Florida. The judgment in a criminal case rendered by the court (App. 1-3) was appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to the jurisdiction vested in the court by 28 U.S.C. 1291.

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himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 8. Joinder of Offenses and of Defendants.

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series

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of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

of acts or transactions constituting an offense or offenses. Each defendant may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

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STATEMENT OF THE CASE

On April 9th, 1987, the Petitioner, THOMAS SIKES, through counsel, contacted Mike Devlin, a Special Agent of the United States Drug Enforcement Administration, to negotiate a cooperation agreement. Discussions were initiated regarding an immunity agreement for SIKES. Devlin recalled that the years the immunity agreement was to cover were 1981-1985, but he testified that at the time of that discussion, the inclusion of the year 1986 in the immunity agreement would have made no difference.[1]

Fred Schwartz, the attorney who initiated the contact with the D.E.A. regarding the immunity agreement, testified that the Petitioner's sole purpose in initiating the negotiations with D.E.A. was to acquire an "immunity

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[1] A.U.S.A. Karadbil had the same impression.

bath" for all of his prior criminal activities. In other words, the sole motivation for SIKES was to avoid indictment for any of his past criminal activities.

Alvin E. Entin also represented SIKES. He negotiated the immunity agreement and testified at the hearing on SIKES' Motion to Dismiss the indictment that SIKES' responsibilities were to furnish the government with information, and to introduce the agents to smugglers. The District Court found that the Petitioner performed his obligations under the agreement. The government did not appeal this finding.

Entin testified that it was understood by the government that SIKES was trying to avoid prosecution for any and all prior activities.

In his first conversation with Assistant U.S. Attorney Neil Karadbil,

Entin remembered mentioning immunity for illegal activities occurring over a six-year period. He drafted a letter to cover the period from 1981 through 1986 which reflected his oral understanding with Karadbil.[2] However, Entin mistakenly inserted the year 1985 instead of 1986 as the last year to be covered by the agreement.

After Karadbil sent back a signed copy of the letter agreement, Entin sent it to SIKES. SIKES called him immediately (on May 13) to point out the error in the date. Entin sent a corrective letter to Karadbil on May 14th, but received no response, and no indication that any problem of any nature existed until he received Karadbil's June 2nd letter.

SIKES testified at the motion

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[2] Although Entin and Karadbil had primarily discussed the years 1985 and 1986, Entin extended the agreement back to 1981, because "nobody really cared" about the years to be covered.

hearing, that the only drug transactions that he was concerned about occurred in 1985 and 1986. He did not engage in any drug deals in 1981-1984.

On May 12, Special Agent Devlin was called into the office of his superior, Pat Shea, and told that Mr. SIKES was the target of a federal investigation in Ft. Lauderdale, Florida.[3] However, Shea did not tell Devlin to terminate the cooperation SIKES was giving, or to cease using SIKES as an informant. In fact, Shea told Devlin to proceed with the operation, even though he was aware that the revelation of the investigation with SIKES might affect the agreement. Nor did Devlin tell SIKES that he was the subject of an investigation.

On May 29th a meeting was held as the result of a prior meeting on May 21, which

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[3] A.U.S.A. Neil Karadbil was also informed of the problem on May 12.

was attended by Devlin, Shea, Agents Benisek, Bob Mangiamele, and Paul Teresi,[4] and Eileen O'Connor, the prosecutor in the instant case. At the meeting, it was agreed that they would not use SIKES again, and that he would be debriefed one more time, in order to obtain more particular information about SIKES' smuggling activities during 1981-1985. Devlin and the other Miami-based agents were instructed not to debrief SIKES for activities occurring in the year 1986, but he was extensively interviewed regarding criminal activities in 1985. Furthermore, SIKES specifically referred to a 450 kilogram cocaine deal in February, 1986, and a 500 kilogram cocaine deal in July or August of 1986.

On September 23, 1987, a federal grand jury sitting in the Southern

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[4] The head of the Ft. Lauderdale D.E.A. Office.

District of Florida returned a twenty-nine (29) count indictment against the Petitioner, THOMAS D. SIKES, and twenty (20) other individuals. SIKES was charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count I), conspiracy to import cocaine, in violation of 21 U.S.C. 963 (Count II), conspiracy to possess approximately two hundred and fifty (250) kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. 846 (Count III), importation of approximately two hundred and fifty (250) kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2 (Count XII), possession with intent to distribute approximately two hundred fifty (250) kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XIII), importation of three hundred (300) kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 18

U.S.C. 2 (Count XIV), possession with intent to distribute approximately three hundred (300) kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XV), importation of three hundred fifty (350) kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2 (Count XVI), possession with intent to distribute approximately three hundred fifty (350) kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XVII), importation of three hundred twenty (320) kilograms of cocaine, in violation of 21 U.S.C. 952(a) and 18 U.S.C. 2 (Count XX), possession with intent to distribute approximately three hundred twenty (320) kilograms of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XXI), and distribution of at least one (1) kilogram of cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Count XXVI).

In a clear violation of the Petitioner's agreement with the government, the indictment encompassed crimes allegedly occurring in 1985, and for which the Petitioner had been granted transactional immunity, as well as those allegedly occurring in 1986. Thus, the government had presented testimony to the grand jury regarding the offenses for which SIKES had been immunized.

On December 29, 1987, SIKES filed a Sealed Motion to Dismiss Based upon Specific Performance of an Agreement. The Motion alleged that, pursuant to a cooperation agreement with the government, the Petitioner was not amenable to prosecution for certain of the Counts contained in the indictment.

The Court heard testimony on the motion for three days. Ultimately, the Court's ruling was that there was a valid agreement between the United States and

THOMAS SIKES, that if the Entin letter had said 1986 instead of 1985, Karadbil would probably have signed it, the agreement conferred immunity only for the years covered in the original letter agreement, 1981-1985, and finally, that SIKES' performance under the agreement was satisfactory.

SIKES was declared to be immune from prosecution for criminal acts committed in the years 1981 through 1985. Because other defendants were charged with offenses occurring in 1985 which allegedly involved SIKES, counsel for SIKES asked for a severance of those counts from the indictment. The Court denied the motion.

On June 13, 1988, a jury was empaneled and trial commenced. During the trial, the Court granted a severance as to the counts of the indictment involving the importation of marijuana in 1985. Prior to the severance, however, massive amounts

of testimony were introduced regarding the 1985 offenses, and SIKES was identified on numerous occasions as having been involved in these offenses.

On July 29, 1988, the jury returned a partial verdict, finding SIKES guilty on counts II and III of the indictment. On October 18, 1988 the Court sentenced SIKES to serve a term of thirty-six (36) years incarceration on counts II and III, to be served consecutively to his prior sentence (on 82-73-CR-SMA), a fine of one million ($1,000,000.00) dollars, and an assessment of one hundred ($100.00) dollars.

The Petitioner timely-filed his Notice of Appeal on October 21, 1988. The opinion of the Court of Appeals for the Eleventh Circuit affirming the Judgment of the District Court in United States v. Weaver, 905 F.2d 1466 (11th Cir.1990), was rendered on July 13, 1990. (App. 5-42). The Order denying Petitioner's timely-

filed Petition for Rehearing was rendered by the Court on September 6, 1990. (App. 42-43). The Mandate issued on September 17, 1990, with the Opinion.

REASONS FOR GRANTING THE WRIT

(i) There are basically two kinds of immunity: transactional and use. Use immunity is a creature of statute. Under Title 18 U.S.C. § 6001 et seq. when a person is compelled to testify and is granted "use" immunity nothing he says, nor any investigative leads derived therefrom may be used against him directly or indirectly. Kastigar v. United States, 406 U.S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972).

Transactional immunity is considerably broader than use immunity. It is immunity from criminal prosecution for or on account of any transaction, matter, or thing involving a Defendant for which immunity was granted. In the

instant case the Defendant was granted transactional immunity. This grant should have protected SIKES from any direct or indirect liability for any act for which he was immunized in 1985. Nevertheless, the immunity afforded to the Petitioner in the instant case was significantly narrower than that contemplated in by this Court in Brown v. Walker, 161 U.S. 591, 40 L.Ed. 819, 16 S. Ct. 644 (1896). In Brown, the Court stated (161 U.S. at 597):

> Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and, therefore, constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possible be used as a basis for, or in aid of, a criminal prosecution against the witness, the rule ceases to apply . . . . [Emphasis supplied].

The full extent of the protection afforded under transactional immunity is discussed in Counselman v. Hitchcock, 142 U.S. 547, 35 L.Ed. 1110, 12 S.Ct. 195

(1892) wherein the Court said that a grant of immunity to be valid had to afford absolute protection against future prosecution for the offense to which the question related. It was felt that much of this broad protection would be abrogated by a use immunity statute.

In fact, the National Commission on Reform of Federal Laws pointed out in its Working Papers, 1405-1444 (1970)[5] that:

> We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege. Immunity from use is the only consequence flowing from a violation of an individual's constitutional right to be protected from unreasonable searches and seizures, his constitutional right to counsel, and his constitutional right not to be coerced into confessing....

Thus where transactional immunity is conferred it encompasses a broader degree of immunity than mere use immunity.

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[5] As cited in Kastigar, supra. at 32 L.Ed.2d 212, 221, n.36.

Indeed, as this Court stated in Kastigar, 32 L.Ed.2d at 222:

> While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege.

In the instant case the government was permitted to use the 1985 evidence to convict the Defendant of two counts of the indictment which initially included acts during the year 1985. Although the language in the indictment relating to 1985 was redacted as to SIKES, it was painfully obvious that the criminal acts which occurred in 1985, and upon which the jury heard extensive testimony, involved SIKES. Certainly this is in conflict with the clear language of Brown v. Walker, supra., as cited above.

Despite the false palliative of curative instructions, the harm done to

the Petitioner's defense was manifest. The counts which involved the 1985 acts were the only counts in the Indictment upon which the jury found the Defendant guilty. Having been granted immunity the Defendant is thus entitled to the full benefit of his bargain. Rowe v. Griffin, 676 F.2d 524 (11th Cir.1982). SIKES was denied the benefit of his bargain by being prosecuted with evidence relating to 1985.

Although, as noted above, the Court gave "curative" instructions in regard to the testimony and exhibits, its adequacy is clearly insufficient in that the indirect corroborative usage of the evidence clearly worked to the detriment of the Defendant. In fact, the instructions regarding the prejudicial testimony served only to repeatedly focus the jury's attention on it. Some testimony is simply not amenable to cure by instruction from the Court. United

States v. Garza, 608 F.2d 659 (5th Cir.1979). As the Court stated in Dunn v. United States, 307 F.2d 883, 886 (5th Cir.1962):

> Otherwise stated, one "cannot unring a bell"; "after the thrust of the saber it is difficult to say forget the wound"; and finally, "if you throw a skunk into a jury box, you can't instruct the jury not to smell it."

It is obvious that having failed to sever SIKES from the other defendants when originally requested to do so, the Court, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, should have severed SIKES out of the trial, and tried him separately. Only by that action could the Court have protected the Defendant from the massive spillover of the evidence relating to the 1985 cocaine transactions, and preserved the integrity of the immunity agreement.

In addition, although the Court ultimately severed the marijuana counts from the trial, the admission of days of

testimony regarding them further prejudiced the Defendant.

The ruling of the Court upholding the transactional immunity agreement between the government and SIKES compelled the Rule 14 severance of SIKES from the trial as soon as it became apparent that the government would be relying on evidence regarding criminal activities on his part which occurred prior to 1986. The usage of this evidence was certainly "in aid of" a criminal prosecution.

(ii) Under Kastigar and its progeny it is the government's burden to protect the immunized defendant from violations of the immunity agreement. In the instant case the Government made no such effort. The case law is clear that immunized evidence may not be used in any manner by federal officials in connection with a criminal prosecution, even if the immunized evidence is given in a State proceeding.

Murphy v. Waterfront Commission, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

But a second line of cases rendered by this Court act to protect the Petitioner. In Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1970), the seminal case involving the broken promises of the government, this Court stated:

> ... when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Santobello was indicted on two State felony counts under New York statutes. After negotiating a plea through his attorney, he withdrew his not guilty plea, and entered a guilty plea to a lesser charge. The prosecution agreed to make no recommendation as to the sentence to be imposed.

At the sentencing, a prosecutor who had not been involved in the plea

negotiations appeared, and recommended the maximum sentence. Despite the objections of Santobello's attorney, the Court sentenced Santobello to the maximum sentence. Even though the trial court judge announced that he was not influenced by the prosecutor's recommendation, and was influenced solely by the probation report, the United States Supreme Court reversed.

The Court went on to rule that the fact that the breach was inadvertent was "immaterial." The inadvertence did not lessen the impact of the breach. Nor would the fact that the Court did not rely on the prosecutor's recommendation stave off a remand to the state court for further consideration. id.

In the instant case, the breach of the agreement was clear, material, and deliberate. The government tried four different methods to prejudice the

Petitioner with the evidence relating to 1985. First, it presented the evidence to the grand jury; second, it included counts in the indictment which dealt solely with SIKES' activities in 1985; third, it joined 1985 and 1986 activities in the conspiracy counts; fourth, it denied that SIKES had complied with the immunity agreement; and fifth, after the district court upheld the validity of the agreement as to 1985, and ruled that SIKES had fully complied, it introduced evidence regarding criminal episodes for which SIKES had been given transactional immunity into the trial of the 1986 offenses.

It simply cannot be maintained in good faith that this behavior on the part of the government complied with the letter or the spirit of the agreement. It was a clear breach under Santobello, and the affirmance of its admission by the Eleventh Circuit directly conflicts with

that case.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

ALVIN E. ENTIN, ESQUIRE
Entin, Schwartz, Goldman,
Margules & Moore
2450 N.E. Miami Gardens Drive
Second Floor
Miami, Florida 33180
(305) 932-0550

PROOF OF SERVICE

COMES NOW, Alvin E. Entin, Esq., on behalf of the Petitioner, THOMAS SIKES, and states to this Court:

1) That on December , 1990, the attached Writ of Certiorari submitted on behalf of the Petitioner was mailed at the United States Post Office, Miami, Florida.

2) I certify that a true and accurate copy of the foregoing Petition for Writ of

Certiorari has been furnished to Kenneth W. Starr, Solicitor General of the United States, 10th and Constitution, N.W., Washington, D.C. 20530.

3) Said statement is being submitted to this Court pursuant to Rule 28.2 of the Rules of the Supreme Court.

ALVIN E. ENTIN, ESQUIRE
Entin, Schwartz, Goldman
Margules & Moore
2450 N.E. Miami Gardens Drive
Second Floor
Miami, Florida 33180
(305) 932-0550

SWORN TO AND SUBSCRIBED before me this ____ day of December , 1990.

NOTARY PUBLIC, STATE OF FLORIDA

My commission expires:

90-1161

Supreme Court, U.S.
FILED
DEC 28 1990
JOSEPH F. SPANIOL, JR.
CLERK

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APPENDIX

ALVIN E. ENTIN, ESQ.
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(305) 932-0550

Counsel for the Petitioner

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 87-6197-Cr-RYSKAMP

UNITED STATES OF AMERICA

V.

THOMAS D. SIKES

(Name and address of Defendant)

Alvin E. Entin, Esq.

Attorney for Defendant

THE DEFENDANT ENTERED A PLEA OF:

[( ) guilty ( ) nolo contendere] as to count(s) _____

and, (XX) not guilty as to count(s) Two and Three .

THERE WAS A:

[( ) finding (X) verdict] of guilty as to count(s) Two and Three.

THERE WAS A:

[( ) finding ( ) verdict] of not guilty as to count(s) _____

_____.

( ) judgment of acquittal as to count(s) _____.

The defendant is acquitted and discharged as to this\these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:

COUNT TWO: Conspiracy to import at least one kilogram of cocaine, Title 2 USC Section 963.

COUNT THREE: Conspiracy to possess with intent to distribute at least one kilogram of cocaine, Title 21 USC Section 846.

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the U.S. Attorney General or his authorized representative for imprisonment for a term of THIRTY-SIX (36) YEARS as to Count Two and Three.

IT IS ORDERED AND ADJUDGED that the sentence imposed by this Court (87-6197-Cr-Ryskamp) shall be CONSECUTIVE to the sentence imposed in case number 82-73-Cr-

Aronovitz, S.D. of Fl.

IT IS FURTHER ORDERED AND ADJUDGED that pursuant to Title 18 USC Section 4205(a) that upon serving a minumum term of TWELVE (12) YEARS the defendant may be eligible for parole.

IT IS FURTHER ORDERED AND ADJUDGED that the defendant shall be fined to sum of ONE MILLION DOLLARS ($1,000,000.).

IT IS FURTHER ORDERED AND ADJUDGED that the defendant shall be assessed $100.00.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

refrain from violation of an law (federal, state and local) and get in touch immediately with your probation officer if arrested or questioned by a

law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by

law, may issue a warrant a revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $100.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) Two and Three as follows:

IT IS FURTHER ORDERED THAT counts _____ _____are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and

address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

[ ] The Court orders commitment to the custody of the Attorney General and recommends:

October 21, 1988

Date of Imposition of Sentence

_____

Signature of Judicial Officer

U.S. DISTRICT JUDGE KENNETH L. RYSKAMP

Name and Title of Judicial Officer

OCTOBER 21, 1988

Date

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to ___

_____ at _____

Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____
United States Marshal

By _____
Deputy Marshal

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-6032

D.C. Docket No. 87-6197-Cr-KLR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN WEAVER,
THOMAS D. SIKES,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida Before KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and were argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court

that the judgments of convictions of the said District Court and sentences imposed in these causes be and the same are hereby AFFIRMED.

*Honorable Frank A. Kauf man, Senior U. S. District Judge for the District of Maryland, sitting by d#signation.

Entered: July 13, 1990

For the Court: Miguel J. Cortez, Clerk

By: SS
Deputy Clerk

ISSUED AS MANDATE: September 17, 1990

UNITED STATES of America,

Plaintiff-Appellee,

v.

John **WEAVER**, Thomas D. Sikes,

Defendants-Appellants.

No. 88-6032

United States Court of Appeals,

Eleventh Circuit.

July 13, 1990.

Defendants were convicted in the United

States District Court for the Southern District of Florida, No. 87-6197-Cr-KLR, Kenneth L. Ryskamp, J., of conspiring to import cocaine, and they appealed. The Court of Appeals, Frank A. Kaufman, Senior District Judge, sitting by designation, held that: (1) Government did not breach immunity agreement; (2) improper joinder of offenses was harmless; (3) evidence was sufficient to support convictions; and (4) sentence enhancement was proper.

Affirmed.

1. **Criminal Law § 1144.13** (3,5)

In judging sufficiency of evidence to support conviction, Court of Appeals must view evidence in light most favorable to Government; moreover, all reasonable inferences and credibility choices must be drawn in favor of jury's verdict.

2. **Reformation of Instruments § 19(1)**

Reformation of written agreement is warranted only when evidence demonstrates

that parties' mutual mistake resulted in written documents which does not accurately reflect terms of their agreement; reformation is generally, without more, not available remedy where evidence demonstrates mistake or change of mind of only one of the contracting parties.

3. **Criminal Law § 42**

Immunity agreement, which limited grant of immunity to crimes occurring between 1981 to 1985, was unambiguous and could not be reformed.

4. **Criminal Law § 42**

Government's continued use of defendant as informant after receiving defendant's to extent immunity agreement to other crimes did not estop Government from rejecting such request and subsequently prosecuting defendant for crimes which he sought to have covered by agreement, absent evidence that

defendant's continued cooperation with Government was result of any promise of additional immunity.

5. **Criminal Law § 42**

Drug defendant was not entitled to equitable immunity from prosecution for offenses not covered by immunity agreement absent showing that prosecutor abused his discretion; proposed modification of plea agreement was never agreed to by prosecutor, and there was no evidence that defendant acted in reliance on such modification.

6. **Criminal Law § 42**

When Government contests defendant's good-faith compliance with terms of immunity agreement, and proceeds with its case by way of indictment, defendant is entitled to judicial determination as to whether Government may so withdraw from agreement.

7. **Criminal Law § 42**

Drug defendant's use immunity was not violated by use of evidence relating to offenses which were subject to defendant's immunity agreement in prosecution of codefendants; prosecutor was properly insulated from all of defendant's disclosures to Government pursuant to agreement because her evidence relating to offenses in question derived only from legitimate sources other than defendant's statements.

8. Criminal Law § 42

Drug defendant received full benefit of grant of transactional immunity where he was not prosecuted with respect to incriminating matters which he disclosed, although the evidence was admitted to prove co-defendants' guilt; jury was instructed several times that the evidence should not be considered against defendant.

9. Indictment and information § 130

Marijuana conspiracy and subsequent cocaine conspiracy were improperly joined in same indictment, although some of the same persons were involved in the two conspiracies, conspiracies did not overlap temporally and represented separate transactions. Fed.Rules Cr.Proc.Rule 8(b), 18 U.S.C.A.

10. **Criminal Law § 1167(1)**

Cocaine conspiracy defendants were not unfairly prejudiced by improper joinder of Marijuana conspiracy counts alleged codefendants who had allegedly participated in both conspiracies, court served charges midway through trial, repeatedly cautioned jury to consider marijuana conspiracy evidence only as to codefendants and, in any event, evidence of defendants' guilt was overwhelming. Fed Rules Cr.Proc.Rules 8(b), 14, 18 U.S.C.A.

11. **Conspiracy § 47(12)**

Direct evidence of elements of

conspiracy is not required; rather, defendant's known participation in conspiracy may be established through proof of surrounding circumstances such as act committed by defendant which furthered purpose of conspiracy.

12. Conspiracy § 47(12)

Finding that defendant knowingly participated in cocaine importation conspiracy was sufficiently supported by evidence, although defendant claimed that he did not know that substance he offloaded and transported was cocaine; offloadings were clandestine operations for which defendant was paid substantial amount of money.

13. Criminal Law § 1169.7

Any error in admitting unindicted coconspirator's testimony concerning threats made to him by drug defendants was harmless absent showing of prejudice; ultimate outcome of in-court exchange was

witness' admission that no threats had been made.

14. **Criminal Law §§ 1203.1, 1203.28**

Government must strictly comply with procedural requirements in order to obtain enhancement of drug defendant's sentence based on prior convictions; doctrine of harmless error does not apply to failures to follow the statutory scheme. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 411, 21 U.S.C.A. § 851.

15. **Criminal Law § 1203.7**

Government Sufficiently complied with requirements that it file sentence enhancement information with court before drug trial although information was not actually filed until fourth day after start of trial, where prosecutor personally served defendant and his counsel with copy of information prior to trial and orally advised court before

trial that it was filing information for purpose of sentence enhancement. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 411, 21 U.S.C.A. § 851.

16. **Criminal Law § 1203.9**

Trial court's failure to specifically ask drug defendant whether he had prior drug conviction, as statutorily required for sentence enhancement, did not preclude enhancement where defendants counsel practically affirmed existence of prior convictions; counsel admitted prior drug conviction during opening statement to jury, and impliedly agreed that prior conviction stated in pre-sentence report were correct. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 411, 21 U.S.C.A. § 851.

17. **Criminal Law § 1202.9**

Even if trial court improperly failed to determine that drug defendant had prior

drug conviction, sentence enhancement was proper in that prior conviction was more than five years old, and thus is validity could not be challenged by defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 411 (b, e) 21 U.S.C.A. § 851 (b, e).

Michael Hursey, P.A., Ft. Lauderdale, Fla., for John Weaver.

Alvin E. Entin, Entin, Schwartz, Margules & Schwartz, Miami, Fla., for Thomas D. Sikes.

Dexter W. Lehtinen, U.S. Atty., Eileen M. O'Connor, Dawn Bowen, Asst. U.S. Attys., for Plaintiff- Appellee.

Appeals from the United States District Court for the Southern District of Florida.

Before KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

* Honorable Frank A. Kaufman, Senior U.S.

District Judge for the District of Maryland, sitting by designation. FRANK A. KAUFMAN, Senior District Judge.

Thomas Sikes and John Weaver appeal from their convictions in the United States District Court for the Southern District of Florida and the sentences imposed upon them for conspiracy to import cocaine in violation of 21 U.S.C. § 963 and conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. We affirm.

On September 23, 1987, twenty-one defendants, including the two appellants, were indicted upon twenty-nine counts for various cocaine and marijuana offenses. The indictment contained twenty-one counts charging substantive cocaine-related offenses (Counts 1-3; 12-29). All twenty-one defendants were charged with one or more cocaine related offenses. Count one charged Sikes with conducting a criminal

enterprise in violation of 21 U.S.C. § 848.[1] Count two charged Sikes and weaver and seventeen other defendants with conspiracy to import at least one kilogram of cocaine, in violation of 21 U.S.C. § 963. Count three charged all defendants with conspiracy to possess with intent to distribute at least one kilogram of cocaine in violation of 21 U.S.C. § 846.[2]

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[1] A superseding indictment was filed on June 8, 1988 in which, in relation to the forfeiture provisions of Count One, certain additional property not mentioned in the original indictment is specified.

[2] Also, Sikes was charged in Counts Twelve, Fourteen Sixteen and Twenty with the importation of at least one kilogram of cocaine, in violation of 21 U.S.C. § 9529a); in Counts Thirteen, Fifteen, Seventeen and Twenty-one with possession with intent to distribute at least one kilogram of cocaine, and in Count Twenty-six with distribution of at least one kilogram, in violation of 21 U.S.C. § 841(a)(1). Weaver was charged in Counts Twelve and Fourteen with the importation of at least one kilogram of cocaine, in violation of 21 U.S.C. § 952(a), and in Counts Thirteen and Fifteen with possession of with intent to distribute at least one kilogram of cocaine, in violation of 21 U.S.C. § 841(a)(1).

In addition to the cocaine counts, the indictment included eight counts charging eleven defendants, but not Sikes or Weaver, with substantive marijuana-related offenses (Counts 4-11). After certain defendants entered pleas of guilty, the case proceeded to trial against nine defendants,[3] only two of whom, Robert Bradley and Norman Speck, were charged in any of the marijuana counts. After four and one-half days of trial, the court severed the marijuana charges and continued the trial as to the nine defendants solely with respect to the cocaine charges. At the conclusion of the trial, Sikes and Weaver were found guilty under Counts Two and Three. As to the other counts in which Sikes and Weaver were charged, the jury failed to reach

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rges against them.

verdicts.[4]

Weaver was sentenced to concurrent six year terms of incarceration in connection with his conviction upon Counts Two and Three. Sikes was sentenced to two concurrent thirty-six year terms of imprisonment in connection with his convictions upon Counts Two and Three, those terms to run consecutively with a sentence imposed in a prior case. In addition Sikes was fines $1,000,000.

In this appeal, the following questions are presented: (1) whether Sikes

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[4] As to the remaining defendants, Speck was found not guilty as to all counts upon which he was charged; Wilson and Craig were found guilty as to Counts Two and Three; and Castello was found guilty as to Count Two. The jury failed to reach verdicts as to the remaining counts against those defendants. In addition, the jury also failed to reach verdicts with respect to any counts as to defendants Bradley, Fowlkes and Scara. In a separate opinion bearing today's date, we deal with certain double jeopardy issues raised by Bradley and Speck in their attempt to bar a new trial upon the severed marijuana counts.

was properly prosecuted for offenses he committed during 1986; (2) whether the district court properly admitted evidence at trial relating to Sikes' 1985 offenses; (3) whether the joinder of the marijuana and cocaine offenses was proper; (4) whether there was sufficient evidence to support Weaver's convictions; (5) whether the testimony regarding certain threats constituted undue prejudice; and (6) whether Sikes' enhanced sentence was proper.

I. EVIDENCE AT TRIAL[5]

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[5] The facts stated in sections I and Ii of this opinion are stated in accordance with the standard set forth in Glasser v. United States, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed 680 (1942), namely, that in judging the sufficiency of the evidence, this court must view the evidence in the light most favorable to the government. Moreover, all reasonable inferences and credibility choices must be drawn in favor of the jury's verdict. United States v. Leavitt, 878 F.2d 1329, 1335 (11th Cir.), cert. denied ___ U.S.__ 110 S.Ct. 415, 107 L.Ed.2d 380 (1989).

1. From 1983 until May 1985, certain persons, several of whom subsequently cooperated with the government and are alleged to be unindicted co-conspirators in the aforementioned marijuana and cocaine conspiracies, smuggled marijuana by boat and plane from the Bahamas, Jamaica, and Belize into the United States. In May 1985 Sikes conspired with some of those persons to import cocaine from Columbia into the United States and became a leading figure - if not the leading figure - in that effort. That conspiracy involved inter alia, arrangements for the use of Florida-based airplanes to fly cocaine on four occasions from Columbia to safe landing areas in Louisiana and Florida, and then to transport that cocaine by automobile to safe locations in Florida. Weaver was one of the persons hired and paid by Sikes to offload the

planes and transport the cocaine to Florida on two of the four occasions.

II. EVIDENCE IN THE PRETRIAL HEARING REGARDING THE PLEA AGREEMENT

In January 1983, Sikes was convicted in the court below in an earlier case for drug related offenses committed between 1978 and 1981. That conviction was affirmed in United States vs. Van Horn, 789 F.2d 1492 (11th Cir.), cert denied, 479 U.S. 886, 107 S.Ct 279, 93 L.Ed.2d 255 (1986). Sikes, who was at liberty on an appeal bond in connection with certain matters in that case after the Supreme Court's said denial of a writ of certiorari, contacted, through an attorney, Alvin Entin, Special Agent Devlin of the Drug Enforcement Administration (DEA). On April 10, 1987, at a meeting with DEA Agents Devlin and Benisek, and with Sikes present, Entin stated that Sikes wanted to work with the

DEA in exchange for immunity for Sikes from prosecution for three cocaine smuggling ventures in which Sikes had participated with individuals named "Carlos" and "Sammy," later further identified as Carlos Betancourt and Serviano Manga. During that meeting, the specifics of those offenses were not discussed, but there was some discussion about the years in which the offenses were committed. According to Entin, he represented that Sikes engaged in criminal activity with "Carlos" and "Sammy" in 1984 and 1985, and may have engaged in criminal conduct in 1986. According to Devlin and Benisek, the general time frame under discussion was 1981 through 1985, and the three smuggling ventures were represented to have occurred in 1984 and 1985. The latter representation was memorialized by Agent Benisek in a DEA-6 report of the meeting. Sikes stated that if the

government agreed not to prosecute him for the offenses mentioned by Sikes during that April 10, 1987 meeting, he would assist the DEA in the interdiction of an importation of cocaine from Columbia which "Carlos" and "Sammy" were planning. Devlin informed Entin and Sikes that he was amenable to such and agreement subject to two conditions: 1) verification that Sikes was not currently under investigation; and 2) approval of the agreement by an Assistant United States Attorney.

Benisek checked the government's NADDIS[6] information system to determine whether Sikes was under investigation and received a negative response.[7] Devlin

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[6] NADDIS is the Narcotic and Dangerous Drug Information System.

[7] That response was erroneous as information had in fact been placed into the NADDIS system reflecting that Sikes was under investigation on or about April 10, 1987.

discussed Sikes' proposal with Assistant United States Attorney Neil Karadbil, who had prosecuted Sikes in 1982-83, and told Karadbil that Sikes wanted immunity from prosecution for three smuggling offenses committed between 1981 and 1985 in exchange for Sikes' full cooperation with the DEA.

Subsequently, Entin drafted a proposed written agreement dated April 20, 1987, which he sent to Karadbil. The letter stated, in pertinent part:

> In return for (Sikes') assistance, the government has agreed that Mr. Sikes has disclosed participation in approximately three cocaine operations which took place from 1981 to 1985. With regard to these approximately three operations, the Government has agreed not to prosecute Mr. Sikes for his participation in same in any Federal

Court. As each of these matters involved in some way the Southern District of Florida, your office may appropriately act in this matter.

Karadbil signed the agreement and returned it to Entin.

Between April 10 and May 13, 1987, Sikes introduced and under-cover DEA agent to "Carlos" and "Sammy" in Miami. Plans were made for an airplane to fly to Columbia to pick up the Cocaine on May 15th and return to Florida.

Unbeknownst to Devlin, Benisek and Karadbil, DEA Agent Mangiamele and Assistant United States Attorney Eileen O'Connor were at the time investigating Sikes' drug trafficking activities occurring after 1982. On approximately May 12, 1987, Mangiamele became aware of the agreement between Sikes and the government, and notified O'Connor and Karadbil of the situation.

On May 13th or 14th, Sikes told Entin that some people in Miami knew that he was cooperating with the authorities and accused Entin of leaking the information. According to Entin, Sikes also stated that Sikes did not believe that the agreement accurately reflect the time period to be encompassed by the non-prosecution portion of the agreement. On May 14th, Entin sent Karadbil a letter stating that the original agreement contained a typographical error in that Sikes was to receive immunity from prosecution for offenses committed between 1981 and 1986, rather than 1981 through 1985.

On May 15th, the planned cocaine importation was aborted when the pilots were unable to locate the airstrip in Columbia. That same day, Sikes, who had stated that he would be readily available to assist the DEA, left Miami and the agents were unable to locate him. Sikes

later claimed that he left because of a family emergency.

On May 20th, Benisek and Devlin, together with another DEA agent, Shea, confronted Sikes concerning his disappearance on May 15th. The agents did not find Sikes' explanation plausible and informed him that he was "back to square one" in terms of fulfilling his cooperation requirements pursuant to the agreement. Sikes offered to introduce the agents to a cocaine dealer named "Manny." Sikes then placed a telephone call to "Manny" and, later that day, met "Manny." alone while under surveillance by DEA agents.

On May 21st, O'Connor, Mangiamele and Mangiamele's supervisor met with Benisek and Devlin and their supervisors. O'Connor instructed the latter two agents to "debrief" Sikes as to the specifics of the three smuggling ventures Sikes had

referred to on April 10th.[8] O'Connor further instructed the agents to terminate Sikes as an informant following that interview.

Benisek and Devlin met with Sikes on May 29, 1987. Sikes told those two agents that the three ventures involved Carlos Betancourt, Serviano Manga, and an individual named "Gore," that he could not remember any other persons involved in the smuggling ventures, and that the three offenses did not take place between 1981 and 1985, but instead occurred in 1985 and

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[8] O'Connor wanted the agents to ascertain the specifics of those offenses so that if litigation ensued and the court decided that Sikes had not breached the agreement, there would be no question about the offenses to which Sikes was entitled to receive immunity from prosecution. She also instructed the agents not to question Sikes about any offenses occurring after 1985, as she believed that Sikes had no immunity for those offenses under the agreement.

1986.[9] Sikes was also questioned about "Manny."

In a letter dated June 2, 1987, Karadbil, responded to Entin's May 14th letter, stated that Entin's letter was an attempt to extend Sikes' immunity for criminal conduct falling outside the originally agreed upon time frame. Karadbil also state that Sikes had violated the cooperation terms of the agreement, rendering the agreement null and void.

Sikes was subsequently charged in twelve counts of the twenty-nine count indictment in this case as a result of the investigation conducted by O'Connor and Mangiamele. The criminal

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[9] Specifically, Sikes stated that the cocaine ventures occurred in August, 1985 (360 kilograms); February, 1986 (450 kilograms); and July or August, 1986 (500 kilograms). At O'Connor's instruction, she and Mangiamele were not advised of the specifics of Sikes' disclosures at either the April 10th or May 29th meeting.

acts for which Sikes was so charged occurred in 1985 and 1986. Sikes filed a motion to dismiss the indictment alleging that the non-prosecution agreement covered the offenses charged in the indictment.

At the conclusion of an evidentiary hearing, the court below concluded that: 1) the parties' agreement was embodied in the letter agreement dated April 20, 1987; 2) the agreement was binding on the government; 3) Sikes had not breached the agreement; but 4) Entin's letter of May 14th constituted an attempt to modify the terms of the agreement and the government had no obligation to accept such modification. Therefore, Sikes was entitled to immunity from prosecution for offenses committed between 1981 and 1985, but not for offenses committed in 1986. The indictment was redacted to conform to that determination by the trial court.

In this appeal, Sikes challenges

those conclusions reached by the court below.

III. PROSECUTION FOR 1986 OFFENSES

Although Sikes acknowledged in his initial brief filed in this appeal that the record supports the district court's determination that the initial agreement of April 20, 1987 only granted immunity from prosecution for offenses committed between 1981 and 1985, in his reply brief and a oral argument in this court, Sikes asserted that the April 20, 1987 agreement is ambiguous as to whether Sikes was granted immunity from prosecution for crimes committed in 1986. Further, Sikes argued that the trial court's ruling that the May 14, 1987 letter from Sikes' counsel to the government was an attempt on Sikes' behalf to extend the period of immunity was clearly erroneous. According to Sikes' the May 14th letter was written by his attorney for the purpose of

correcting a typographical error in the April 20th letter of agreement. Sikes further states that the failure of the government either to respond negatively to the May 14th letter or immediately to cease using Sikes' services as an informant estops the government from denying that the subsequent letter modified the April 20th agreement to include immunity for the year 1986. Finally, Sikes' takes the position that the governments failure to respond to his counsel's letter of May 14th until after Sikes had concluded his cooperation with the DEA agents constitutes the type of egregious conduct which required the district curt to impose "equitable immunity" for the year 1986, or at least to conclude that the government's failure to respond rendered the agreement ambiguous as to the year 1986. We find none of those arguments persuasive.

Both Sikes and the government agree that the April 20, 1987 letter of agreement constituted a grant of immunity in exchange for Sikes' cooperation with the government in its ongoing investigation. Federal prosecutors mat enter into such agreements. See, e.g., United States v. Harvey, 869 F.2d 1439 (11th Cir.1989) (en banc). As Judge Kravitch wrote in that case, "[d]ue process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes," and courts will enforce such agreements "when the defendant of witness has fulfilled his side of the bargain." Id, at 144344 (citations omitted).

[2] Determination of the extent of immunity afforded by the April 20 and May 14, 1987 letters required the application of basic principals of contracts law. See, Rowe v. Griffin, 676 F.2d 524, 528 (11th

cir. 1982) ("contractual analysis applies equally well to promises of immunity from prosecution"); United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986) ("[p]rivate law interpretive principals may be wholly dispositive in an appropriate case"). See also Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1972). A basic tenant of contract law is that a written agreement which is unambiguous on its face should be interpreted and enforced accordingly.

For example, whether a written agreement is ambiguous or unambiguous on its face should ordinarily be decided by the courts as a matter of law.

If it is unambiguous as a matter of law, and there is no suggestion of government overreaching of any kind, the agreement should be interpreted and enforced accordingly. Neither side should be able,

any more than would be private contracting parties, unilaterally to renege or seek modification simply because of uninduced mistake or change of mind. Such an approach is conformable not only to the policies reflected in private contract law from which it is directly borrowed, but also to constitutional concerns of fundamental fairness in "bargaining" for guilty pleas, and to the wider concerns expressed in the exercise of supervisory jurisdiction over the administration of federal criminal justice.

United States v. Harvey, 791 F.2d at 300 (citations omitted). Also,reformation of a written agreement is warranted only when the evidence demonstrates that the parties' mutual mistake resulted in a written document which does not accurately reflect the terms of their agreement. See Restatement (Second) of Contracts § 155 (1979). Consequently, reformation is

generally, without more, not an available remedy where the evidence demonstrates mistake or change of mind of only one of the contracting parties. See id. at § 153.

[3, 4] Sikes contends that the April 20, 1987 letter of agreement is ambiguous on its face because the clear intent of both parties in the letter was to grant immunity from prosecution for " approximately three cocaine operation," not to restrict immunity to the years 1981 through 1985.[10] We disagree and conclude

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^F [10] The government stated during oral argument before us a that the 1986 criminal activity for which Sikes was indicted and subsequently convicted was not necessarily one of the "approximately three cocaine operations" for which Sikes was granted immunity. According to the government, the three narcotics transactions Sikes referred to in his May 29, 1987 debriefing do not match up with the allegations contained in the indictment with regard to the 1986 operation. For instance, at the debriefing, Sikes told the agents that the three drug ventures in which he participated and for which he sought immunity involved two individuals named Carlos Bentancourt and Serviano Manga. In that regard, the government points out

that the April 20th agreement limiting the grant of immunity to the period 1981 to 1985 is unambiguous.

The evidence adduced at the motions hearing showed that during the April 20th meeting, Sikes' attorney specifically referred to three cocaine operations which occurred during 1984 and 1985, and that the government agreed to grant Sikes immunity from 1981 to 1985 in exchange for his cooperation. Notes taken by both sides during a meeting and a DEA report produced shortly after the meeting confirm

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that the indictment contains no mention of those two individuals, and that no evidence was introduced at trial regarding them. Thus, the government suggests that the 1986 offenses for which Sikes was prosecuted were not covered by the agreement because they were not part of the "approximately three narcotics transactions" covered by the April, 1987 agreement. That approach by the government, while not unpersuasive, need not be relied upon by this court in view of the evidence relied upon by the court below and which supports that court's determination.

that the agreement related to the 1981 to 1985 dates. Moreover, Sikes' attorney, who had conducted negotiations on behalf of and in the presence of his client, personally drafted the April 20th document which unambiguously stated that the cut-off date for non-prosecution was 1985. Thus, in refusing to extend immunity for the year 1986, the district court properly measured the terms of the immunity agreement "by objective standards, not the subjective beliefs of the parties." See, with regard to plea agreements, United States v. Calimano, 576 F.2d 637, 640 (5th Cir. 1978); Johnson v. Beto, 466 F.2d 478, 480 (5th Cir. 1972). In addition, having concluded that there was no mutual mistake as to the intended scope of the contract, the district court correctly concluded that reformation was unwarranted and that Sikes May 14, 1987 letter constituted a unilateral attempt to modify the terms of

the agreement. Sikes' further contention that the government was obligated to accept the purposed modification because the government would likely have been willing in the first instance to include 1986 in the agreement is equally unpersuasive.[11] Assuming Arguendo only that the government would have initially agreed to include 1986 in the terms of the agreement, it is irrelevant, in determining the terms actually agreed on, that either of the parties may subjectively have harbored a willingness to accept different terms. What controls

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[11] The government has not denied that it might, at the April 10, 1987 meeting, having accepted an expansion in the scope of immunity granted to Sikes to include 1986 if that date had been requested. However, relying on principles of contract law, the district court appropriately rejected Sikes' contention that the government was subsequently obligated to extend the grant of immunity to 1986 merely because it might have agreed in the first instance to include that date.

is upon what the parties agreed, not upon what they did not agree. The contract, once created, is to be interpreted in accordance with the objective import of its unambiguous terms. See Johnson v. Beto at 480.

Sikes' insistence that the government was obligated to accept the terms of the May 14, 1987 letter as a result of the prosecutor's failure to respond is unavailing in light of the government's letter of June 2, 1987 which expressly rejected the proposed modification.[12] Thus, even assuming that the May 14th letter can be construed as an offer to

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[12] The approximate two-week delay between the government's receipt of the May 14th letter and its written response of June 2nd did not operate to bind the government to its proposed terms. Such silence, in and of itself, is not tantamount to acceptance of an offer; an offeror does not have the power to cause the mere silence of an offeree to operate as an acceptance. Restatement (Second) of Contracts, § 69 comment a and c.

renegotiate the terms of the agreement, it did not bind the government because an offer, in the absence of an acceptance, has no legal consequence. See Calimano, 576 F.2d at 639 40. Nor does the fact that the government continued to use Sikes' services as an informant after the governments receipt of, but before its rejection of, the May 14th letter bind the government to renegotiate the terms of the April agreement. The doctrine of estoppel may be invoked to prevent "a person from showing the truth contrary to a representation of fact made by him after another has relied on the representation." Restatement (Second) of Contracts, § 90 comment a. For the government to be estopped from prosecuting Sikes for crimes committed in 1986, Sikes would have to show that his cooperation after May 14th wa a result of the government's representation that he would not be

prosecuted for criminal acts committed in 1986. In this case, Sikes has not presented or proffered any such evidence. Under such circumstances, a person such as Sikes may not prevail upon an alleged existence of an agreement of the type involved in this case based solely on the defendant's subjective impression that a promise had been made; instead, objective standards are utilized. See Calimano 576 F.2d at 640. See also United States v. Weiss, 599 F.2d 730, 736-38 (5th Cir.1979).[13] By contrast as to result, but in accordance with the same principles of law, this court, in Rowe v. Griffin, 676 F.2d at 528, affirmed the district court's dismissal of an indictment upon a prima facie showing that the government

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[13] Calimano (1978) and Weiss (1979), which are opinions of the Fifth Circuit filed prior to October 1, 1981, are binding as precedent in this circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

had promised the defendant immunity from prosecution for certain offenses in return for his cooperation and that the defendant had complied in good faith with the terms of the agreement. Applying the rationale employed in Calimano, Weiss and Rowe to the facts of the instant case, since the government made no promises that Sikes would not be prosecuted for any offenses committed in 1986, the doctrine of promissory estoppel is of no aid herein to sikes. See Johnson v. Beto, 466 F.2d ar 480 (discussing promissory estoppel in a plea agreement setting).

[5, 6] Sikes' contention of abuse of prosecutorial discretion and his reliance upon the doctrine of equitable immunity are similarly unpersuasive. In Weiss the Fifth Circuit suggested that dismissal of an indictment may be justified in some circumstances as a matter of equitable immunity where the prosecutor abused his

discretion by deciding to prosecute in the face of a promise not to do so and the defendant's resultant cooperation, where the defendants cooperation was such that he (the defendant) should not be prosecuted, or where the government's conduct was so egregious as to offend due process. 599 F.2d at 735 n. 9. None of those reasons exists in this case. Accordingly, the prosecution for crimes committed in 1986 did not violate the government's agreement with Sikes. However, the government also prosecuted Sikes for offenses occurring prior to 1986. Those offenses were covered by the April 20th letter of agreement. That latter governmental action was base upon Sikes' alleged breach of his obligations under that agreement. When the government contests the defendant's good faith compliance with the terms of an agreement an proceeds with its case by way of

indictment, the defendant is entitled to a judicial determination as to whether the government may so withdraw from the agreement. In this case, the inclusion of the 1985 offenses in the indictment called for the question of Sikes' good faith compliance with the April, 1987 agreement to be reviewed by the district court and, in of itself, did not constitute a breach of that agreements or bad faith prosecution. When that question was presented after indictment, the court below concluded that Sikes had not breached the terms of the agreement so as to permit prosecution of him for the pre-1986 offenses. Accordingly, the indictment was redacted as to the pre-1986 offenses and Sikes received the full benefit of the April 1987 agreement.

As to Sikes' contention that his good faith cooperation with the agreement

entitles him to equitable immunity for offenses committed in 1986, that claim lacks any merit. Sikes' cooperation was as prerequisite to his entitlement of immunity promised to him pursuant to the April 20th agreement. The fact that the district court determined that he had performed his side of the bargain under that agreement does not entitle Sikes to benefits beyond those which were promised to him. Although Sikes may have hoped that his continued cooperation would ultimately induce the government to extend the terms of his immunity, the government was not responsible for the unfounded expectation. Thus, this is not a case in which promises made in bad faith may constitute trickery so flagrant as to violate a defendant's constitutional rights. United States v. Battle, 467 F.2d 569, 570 (5th Cir.1972). Finally, Sikes' cooperation was not related to the charges

for which he was prosecuted; nor were statements which Sikes made during the course of his cooperation subsequently used against him. Consequently, Sikes can show no prejudice in this appeal resulting from his cooperation with the government. See United States v. Donahey, 529 F.2d 831, 832-33 (5th Cir.), cert. denied, 429 U.S. 828, 97 S.Ct, 85, 50 L.Ed.2d 91 (1976).

In sum the district court's determination that the April 1987 immunity agreement did not include the year 1986 is based on "a fair, thorough, and objective examination of the evidence," Calimano, 576 F.2d at 640, and certainly is not clearly erroneous. ld.

IV. EVIDENTIARY USE AT TRIAL OF PRE-1986 OFFENSES

While Sikes was not prosecuted for any pre-1986 offenses, the government was permitted to introduce at trial evidence

relating to 1985 offenses subject to an instruction to the jury that the 1985 evidence was not to be considered as to the charges against Sikes, but only as to the charges against other defendants. Sikes asserts that the immunity he received from the government in exchange for his cooperation protected him from either the direct or indirect use at trial of any evidence of events which occurred between 1981 and 1985.

[7] Before the trial commenced, the indictment, as indicated supra, was redacted to exclude reference to pre-1986 offenses. Further, in accordance with Karadbil's June 2, 1987 letter, "{n}one of the information obtained from Mr. Sikes, however limited, {was} used against Mr. Sikes," and as per that letter, none of the information provided by Sikes was made known to O'Connor, who prosecuted the case, or Mangiamele, the government's

agent-in-chief. Moreover, during the hearing with regard to Sikes' motion to dismiss, Sikes' attorney stated that he was not making any Kastigar[14] motion because he believed that the prosecutor had properly insulated herself. In Kastigar, the Supreme Court stated that: "Transactional immunity... accords full immunity from prosecution for the offense to which... compelled testimony relates...." Kastigar v. United States, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661, 32 L.Ed.2d 212 (1972). In United States v.

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[14] In Kastigar v. United States, 406 U.S. 441, 460-61, 92 S.Ct. 1653, 1664-65, 32 L.Ed.2d 212 (1972), the Supreme Court held that once a person is compelled to give testimony under a grant of immunity from the use in any criminal case of such testimony or any evidence derived therefrom, the government bears the burden of proof, in a subsequent criminal prosecution for an offense to which the compelled testimony relates, to show that the evidence upon which the government relies "is derived from a legitimate source, wholly independent of the compelled testimony." Id. at 460, 92 S.Ct. at 1665.

Harvey, 869 F.2d at 1446, Judge Kravitch recently addressed, for the majority of an en banc court, the subjects of both transactional and use immunity:

> [T]ransactional and use immunity are coterminous with the fifth amendment privilege (against self-incrimination) in all respect other than their effect on the government in the future. A grant of use immunity prohibits the government from using evidence disclosed either directly or derivatively, while a grant of transactional immunity prohibits the government from prosecuting the witness at any time with respect to the incriminating matters the witness disclosed.

In this instance, the government and Sikes' counsel agree that the prosecutor was properly insulated from all of Sikes' disclosures to the government pursuant to the April 1987 letter of agreement. Therefore, Sikes' use immunity was not

violated. See generally Kastigar 406 U.S. at 460-62, 92 S.Ct. 1664-66. Sikes received the full benefit of the grant of use immunity because the government's evidence relating to the 1985 offenses was derived only from legitimate sources other than his cooperation with the government pursuant to the April 1987 agreement.

[8] As to Sikes' claim that the grant of transactional immunity protected him from the direct or indirect use of any evidence relating to events which transpired prior to 1986, Sikes received the full benefit of his grant of transactional immunity because he was not prosecuted with respect to the incriminating matters which he disclosed. The government's introduction of evidence relating to 1985 offenses, with an instruction given several times to the jury be the district court that such evidence should not be considered against

Sikes, was not a violation of the terms of the agreement. In the immunity agreement, the government agreed not to prosecute Sikes for those offenses, and further agreed not to use his disclosure against him. The use of the disclosures by Sikes as evidence against others did not violate the government's agreement with Sikes.[15]

The instructions of the court below to the jury effectively gave to Sikes' the protection to which he was entitled. In that context, it is not to be assumed that the jury will be unable to follow the

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[15] In United States v. Van Horn, 789 F. 2d at 1509-10, the defendant asserted that admission against him in a subsequent proceeding of certain evidence as prior similar act evidence violated an agreement in which the federal government agreed not to pursue any criminal or civil liability arising out of a prior arrest and conviction for state drug charges in return for the defendant's agreement to forfeit a vessel to the United States. In rejecting that argument, Judge Kravitch noted that "[t]he government did not agree to never use the arrest as evidence in a prosecution for subsequent criminal activity." Id. at 1510.

trial court's instructions. See Lakeside v. Oregon, 435 U.S. 333, 340 n. 11, 98 S.Ct. 1091, 1095 n. 11, 55 l.Ed.2d 319 (1978).

V. JOINDER

{9,10} Both Sikes and Weaver contend that the joinder of the marijuana and cocaine counts, particularly the conspiracy counts, in the same indictment was improper under Fed.R.Crim.P. 8(b) since the two conspiracies were separate and each of them as defendants was only charged in the cocaine conspiracy. In that regard, both appellants assert that they were prejudiced by that improper joinder because the jury was allowed to hear evidence regarding a marijuana conspiracy in which their co-defendants, but neither of them, were involved. The answer, however, to that contention is that "{s}eparate conspiracies with different memberships may still be joined

if they are part of the same series of acts or transactions." United States v. Grassi, 616 F.2d 1295, 1303 (5th Cir), cert. denied, 449 U.S. 956, 101 S.Ct. 363, 66 L.Ed.2d 220 (1980).

Twenty-one defendants were charged in twenty-nine count indictments in this case. Of those twenty-one defendants charged, all were charged in the cocaine conspiracy and eleven were also charged in the marijuana conspiracy. In addition to those named, two unindicted co-conspirators were purportedly involved in both the marijuana and cocaine conspiracies. Owing to pleas of guilty and the fugitive status of two of the defendants, only two defendants, Bradley and Speck, were confronted at trial with marijuana charges, while all nine of the remaining defendants who went to trial

faced cocaine counts.[16]

According to the indictment and the evidence at trial, the marijuana conspiracy which originated in 1983 gradually expanded and switched to cocaine as the drug of popular choice in 1985. However, many of the participants and facts surrounding both of those conspiracies were substantially interrelated.

Joinder of parties and defendants under rule 8 is designed to promote judicial economy and efficiency. Accordingly, as Judge Roney has written, Rule 8 "is broadly construed in favor of the initial joinder." United States v. Davis, 773 F.2d 1180, 1181 (11th Cir.1985). The question of whether initial joinder is proper under Rule 8(b)

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[16] As indicated earlier in this opinion, see note 4, Bradley and Speck have separately appealed.

is to be determined before trial by examination by the trial court of the allegations stated on the face of the indictment.[17] However, whether joinder is improper based upon evidence proffered before or adduced during trial is governed by Rule 14.[18] United States v. Morales,

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[17] Federal Criminal Rule 8(b) provides:

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

[18] Federal Criminal Rule 14 provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or

868 F.2d 1562, 1567-68 (11th Cir.1989). Thus, we must first look to the indictment in order to determine if appellants' initial joinder was proper under Rule 8(b). Id. If improper joinder under Rule 8(b) occurred, reversal is not required if the misjoinder was harmless error. United States v. Lane, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986). The improper joinder is harmless unless it "results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict." Id., quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946). "Consequently, the question of whether it is proper to restrict a Rule 8(b) inquiry to the indictment is largely academic because in

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confessions made by the defendants which the government intends to introduce in evidence at the trial.

deciding whether reversal is required, assuming the joinder was improper, the reviewing court must necessarily look to the evidence adduced at trial to determine whether the defendant has been prejudiced." Morales 868 F.2d at 1567 n. 3. Thus, in many instances, a reviewing court may "simply [look] to the prejudice component of defendant's claim and only in the rare case where the defendant has demonstrated prejudice will the court be required to address the issue od whether the joinder was actually proper." Id.

The face of the indictment discloses that the marijuana conspiracy and the subsequent cocaine conspiracy were improperly joined in this case in the same indictment. The two conspiracies did not overlap temporally; the cocaine conspiracy did not begin until the marijuana conspiracy had ended. The two conspiracies were separately charged in

the indictment and the government concedes that they represented separate transactions. Moreover, although eleven of the twenty-one defendants charged in the cocaine conspiracy were also charged in the marijuana conspiracy in the initial indictment, only two of the nine remaining defendants went to trial with regard to the marijuana conspiracy.

Although one of the goals of joinder is to promote judicial economy, a countervailing purpose of Rule 8(b) "is to prevent the cumulation of prejudice {growing our of} charging several defendants with similar but unrelated offenses." United States v. Bova, 493 F.2d 33. 35 (5th Cir.1974), quoting Cupo v. United States 359 F.2d 990, 993 (D.C.Cir.1966) cert. denied, 385 U.S. 1013, 87 S.Ct. 723, 17 L.Ed.2d 549 (1967). "Rule 8(b) permits joinder of defendants if they are alleged to have participated

in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.'" Grassi, 616 F.2d at 1303. However, as Judge Fay has written, " when... the connection between different groups is limited to a few individuals common to each but those individuals commit separate acts which involve them in separate offenses with no common aim, then the requisite substantial identity of facts or participants is not present." United States v. Nettles, 570 F.2d 547, 551 (5th Cir.1978). Similarly, [w]hile criminal acts of several defendants may be similar in nature, these acts cannot be properly joined in a multiple defendant trial if different facts and circumstances must be established to support the alleged violations. But when the facts underlying each offense are so closely connected that proof of such facts

is necessary to establish each offense, joinder of defendants and offenses is proper. United States v. Gentile, 495 F.2d 626, 630 (5th Cir. 1974).

In Gentile, the Fifth Circuit found that improper joinder had occurred where and illegal sale of LSD charged against one of two jointly tried defendants, but not against the other, occurred nearly three weeks after the sale of PCP in which both defendants were allegedly involved. The court noted that "the sale took place at different locations, the transaction involved different drugs" procured from different sources, and the sale of the LSD was not part of the same "series of acts or transactions" as the sale of PCP. Id. at 630-31. Similarly, in the instant case, the facts underlying the various acts relating to the marijuana conspiracy and to the cocaine conspiracy are not " so closely connected that proof of such facts

id necessary to establish each offense," id at 630; nor is there a "substantial identity of facts and participants" involving similar acts in furtherance of a common plan. Nettles, 570 F.2d at 551. Thus, the two conspiracies were separate and distinct transactions. Consequently, initial joinder of the marijuana and cocaine conspiracies was improper under Rule 8(b).

Having decided that initial joinder was improper, we know must address whether that error was harmless. Lane 474 U.S. at 449, 106 S,Ct, at 732. From a review of the allegations contained in the indictment and the evidence in the record, we conclude that the error was harmless.

During the trial, Sikes and Weaver joined in pressing co-defendant Fowlkes' pretrial motion to sever the marijuana counts. Initially, the court did not rule on any of those motions prior to trial.

However, during trial, the court repeatedly gave cautionary instructions to the jury to consider the marijuana conspiracy evidence only as to co-defendants Speck and Bradley, and not against any of the other defendants. Nevertheless, during the fifth day of testimony, the trial court, over the government's objection, served the marijuana counts from the cocaine charges, pursuant to Rule 14, and continued the trial on the cocaine counts against Sikes an Weaver and the seven other defendants. In granting the severance motions of defendants Fowlkes, Sikes and Weaver, the district court instructed the jury that the marijuana evidence applied, if at all, only to Speck and Bradley, and then only as similar act evidence. The court further explained how the jury was to

consider that similar act evidence.[19] The court also cautioned the jury not to consider such evidence for the purpose of corroborating or buttressing the testimony of other witnesses.

Sikes and Weaver have not shown how they were prejudiced by the fact that the district court did not earlier sever out the marijuana charges. This is not a case in which "the jury could not follow the trial court's instructions and separate the evidence relevant to each appellant." United States v. Leavitt, 878 F.2d 1329, 1340 (11th Cir.) cert denied, ---U.S.---, 110 S.Ct. 415, 107 L.Ed.2d 380 (1989). "Instead, it is presumed that cautionary instructions to the jury to consider the

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[19] The court instructed the jurors that they could use the marijuana testimony, not to prove that defendants Speck and Bradley did the acts charged in the case, but only to prove state of mind, i.e., that those defendants acted with the necessary intent and not through accident or mistake.

evidence separate as to each defendant will adequately guard against prejudice." Id. "Absent evidence to the contrary, we presume that the jury was able to follow the court's instructions and evaluate the evidence against each defendant independently." United States v. Badia, 827 F.2d 1458, 1466 (11th Cir.1987), cert. denied, 485 U.S. 937, 108 S.Ct. 1115, 99 L.Ed.2d 275 (1988).

Throughout the trial, the district court gave limiting instruction to the jury concerning marijuana evidence. Had any prejudice from the jury's hearing the evidence concerning the marijuana loads, it would have had its most prejudicial impact upon Speck and Bradley, the only defendants at trial charged with both the marijuana and cocaine conspiracies. Seemingly, the jurors were able to consider the evidence and follow the court's instruction since they acquitted

Speck on the cocaine counts and were unable to return any verdict as to bradley. See e.g., United States v. Morales, 868 F.2d at 1571; United States v. Walker, 720 F.2d 1527, 1534-35 (11th Cir.1983), cert, denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984).

Finally, the evidence introduced at trial implicating Sikes and weaver in the cocaine conspiracy was compelling. Given the "overwhelming evidence of guilt" adduced against Sikes and Weaver and for the other reasons set forth infra in this opinion, the improper joinder was harmless error. Lane, 474 U.S. at 450, 106 S.Ct. at 732.

VI. SUFFICIENCY OF TRIAL EVIDENCE

Appellant Weaver asserts that the government failed to prove that he knew the substance he offloaded and drove was cocaine, and also that there is no evidence that he agreed with anyone to

import cocaine or to transport it after it was in the United States. Although he admits that the evidence established the existence of a conspiracy, Weaver asserts that the government did not demonstrate his knowledge of the existence of the conspiracy or his participation in it. We disagree.

In judging the sufficiency of the evidence, we must determine whether the evidence,when viewed in the light most favorable to the government, is such that a reasonable jury could find that it establishes guilt beyond a reasonable doubt as to the appellant.[20]

The sole determination which this court must make is whether a reasonably-minded jury could have found Weaver guilty beyond a reasonable doubt. United States v. Vera, 701 F.2d 1349, 1357 (11th Cir. 1983). Challenges to the sufficiency of

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[20] See note 5, supra.

the evidence are measured by the following standard:

> "[I]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence."

Id., quoting United States v. Bell, 678 F.ed 547, 549 (5th Cir. 1982), aff'd, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d (1983) (footnote omitted).

[11] To support a conviction for conspiracy, the government must show beyond a reasonable doubt "that the conspiracy existed" between two or more persons to commit a crime, "the accused knew of it, and that, with knowledge, the accused voluntarily became a part of it." United States v. Rackley, 742 F.2d 1266, 1272 (11th Cir. 1984). "Close association with a co-conspirator or mere presence at the scene of the crime is insufficient

evidence of knowing participation in a conspiracy. However, direct evidence of the elements of a conspiracy is not required." Vera, 701 F.2d 1357 (citations omitted). In fact, "[t]here is `rarely any direct evidence of an agreement to join a criminal conspiracy.'" United States v. Miller, 693 F.2d 1051, 1053 (11th Cir. 1982), quoting United States v. Middlebrooks, 618 F.2d 273, 278, modified in part, 624 F.2d 36 (5th Cir.), cert. denied, 449 U.S. 984, 101 S.Ct. 401, 66 L.Ed.2d 246 (1980). Rather, "[a] defendant's knowing participation in an conspiracy may be established through proof of surrounding circumstances such as acts committed by the defendant which further the purpose of the conspiracy." Vera, 701 F.2d at 1357.

[12] Weaver argues that the government failed to prove that he knew the substance he offloaded and drove was

cocaine. However, the evidence adduced at trial supports the conclusion that Weaver, a Florida resident, traveled on two occasions to LaFayette, Louisiana as per arrangements between Weaver and Sikes. Before both offloadings, Weaver and the other offloaders visited the clandestine airstrip. Before the 1985 offload, Weaver, Sikes and all of the other offload crewmembers met, discussed and planned how each vehicle would proceed to the actual landing strip. Each time the plane flew in late at night, it quickly dumped both its duffle bags of cocaine and its extra fuel tanks and immediately took off. Weaver and the other offloaders threw the duffle bags into their vehicles and quickly drove away while other insured that no intruders entered the area. According to Sikes, Weaver was paid $25,000 for each successful offload of cocaine. The evidence supports the

finding that Weaver was a trusted participant in the cocaine smuggling and transportation venture and was chosen for his role by the lead defendant, Sikes. That evidence, coupled with the telephone toll records involving Weaver and the other co-defendants, could have led a reasonable jury to the conclusion that Weaver was a knowing and intentional participant.

The jury could also reasonably conclude that in the course of transporting large quantities of valuable, readily marketable cocaine "'through channels that wholly lack the ordinary protection of organized society, a prudent smuggler is not likely to suffer the presence of unaffiliated bystanders.'" United States v. Quintero, 848 F.2d 154, 156 (11th Cir. 1988), quoting United States v. Cruz-Valdez, 773 F.2d 1541, 1547 (11th Cir. 1985), cert. denied, 475 U.S.

1049, 106 S.Ct. 1272, 89 L.Ed.2d 580 (1986). In sum, the jury's verdict is supported in this case by more than sufficient evidence.

VII. ALLEGED PREJUDICIAL TESTIMONY REGARDING THREATS

[13] During cross-examination of Richard Sommers, an unindicted co-conspirator who was testifying as a government witness, Sommers was asked numerous questions designed to establish that he had violated his plea agreement by lying to the government about his finances. Sommers was asked about a wall built around his home. On re-direct examination, the prosecutor inquired about the cost of the wall and its purpose. Sommers responded that the build the wall "because of threats and beliefs that I have about dangers to my family." The prosecutor then asked: "You didn't receive any specific threats from anybody in this,

that's sitting over there, did you?" Answer: "Specific threat?" Defense counsel objected and the court instructed the jury to disregard the question and answer. The prosecutor sought to rectify any adverse inference which may have been drawn from Sommers' answer and the court agreed it was appropriate to clear up the matter. Sommers was brought into the courtroom outside the jury's presence and was asked by the court whether any of the defendants had threatened him directly or indirectly. Sommers responded: "No" A few moments later the same question was asked of Sommers before the jury. Sommers responded that he was not threatened directly, but equivocated as to indirect threats. Immediately, in the presence of the jury, the court cross-examined Sommers with his prior in camera response. In addition, Sommers' earlier testimony that none of the defendants had threatened him

directly or indirectly was read back to the jury.

That series of questions and answers may well have impeached Sommers and adversely affected the government rather than appellants. In any event, the testimony was hardly very consequential insofar as Sikes or Weaver is concerned when one considers the length of the trial. Even assuming, arguendo only, that there was an error as to Sikes or Weaver-and in this court's view there was no such error-a mistrial was not mandated because, in the absence of actual prejudice and in light of the evidence against Sikes and Weaver, the likelihood of substantial impact on the jury was minimal. United States v. Anderson, 782 F.2d 908, 916 (11th Cir. 1986). Thus, such error, if any, was harmless.

VIII. SENTENCE ENHANCEMENT

Finally, Sikes contends that the

imposition by the court below of an enhanced sentence under 21 U.S.C. § 851 is erroneous because (1) the government failed to give adequate and timely notice of its intent to rely on a prior drug conviction as required by that statute; and (2) the district court neither informed Sikes that he must challenge the validity of any prior conviction underlying the enhancement information nor determined whether Sikes in fact had prior drug conviction.

Section 851 provides, in pertinent part:

> (a)(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial

> or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.
>
> (b) If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not make before sentence is imposed may not thereafter be raised to attack the sentence.(Emphasis added).

The procedural requirements of section 851 apply with respect to any proceeding to enhance a convicted defendant's sentence under both 21 U.S.C. § 841 and § 962, the sentencing provisions applicable to convictions under 21 U.S.C. § 846 and § 963, respectively.

[14] This circuit has insisted upon strict compliance with the mandatory

language of the procedural requirements of section 851(a) and (b). United States v. Noland, 495 F.2d 529, 533 (5th Cir.), cert. denied, 419 U.S. 966, 95 S.Ct. 228, 42 L.Ed.2d 181 (1974); United States v. Cevallos, 538 F.2d 1122, 1126-27 (5th Cir. 1976). This is particularly true with respect to the timing of the government's filing with the court and service on the defendant of an information signifying the government's intent to rely on a prior drug conviction. Noland, 495 F.2d at 533. Even when the defendant is not surprised by the enhanced sentence, was aware from the outset that his previous conviction could lead to an enhanced sentence, never challenged the validity of the prior conviction, and admitted it at the sentencing hearing, the statute prohibits and enhanced sentence unless the government first seeks it by properly filing an information prior to the trial.

Id. "Provisions for enhanced sentencing is a legislative decision, and the procedure the legislature prescribes to effectuate its purpose must be followed." Id. Significantly, "[t]he doctrine of harmless error does not apply" with respect to failures to follow the statutory scheme of § 851. United States v. Olson, 716 F.2d 850, 852 (11th Cir. 1983).

[15] According to the certificate of service attached to the information notifying Sikes of the government's intention to rely upon a prior drug conviction for purposes of sentence enhancement, Sikes' counsel was personally served with the information on June 13, 1988, prior to selection of the trial jury. However, the information itself reveals a filing date of June 17, 1988, which was the fourth day after the start of trial. In addition, the record

reflects that the information was docketed on June 17, 1988. If filing of the information took place after the commencement of the trial, it would appear to run afoul of the mandatory requirement that the information be filed with the court before trial. But, in this case, the transcript of June 13, 1988 reveals that, prior to jury selection, the following statement to the court by the prosecutor. "Ms. O'Connor: Just as a housekeeping matter, also the government is filing an information on Mr. Sikes, notice of a prior conviction, in order to double to maximum penalty. Defense counsel and Mr. Sikes have received a copy." Neither at that time nor at any time prior to sentencing did Sikes note any objection as to the timing or form of the government's notice. By personally serving Sikes and his counsel with a copy of the information for purposes of

sentence enhancement, the government complied with the mandatory requirements of section 851.

[16, 17] Sikes further contends that his sentence was improper because the district court failed to inquire whether he affirmed or denied that he had prior drug conviction, as alleged in the information, pursuant to 21 U.S.C. § 851(b). Indeed, a review of the sentencing transcript reveals that the district court did not specifically ask Sikes whether he had in fact been previously convicted. However, that is understandable when considered in context. During his opening statement to the jury, counsel for Sikes admitted that Sikes had a prior drug conviction. In addition, during the sentencing proceeding, the court reviewed with Sikes' attorney the Pre-Sentence Investigation Report (PSI) prepared by the probation officer. In

discussion the prior arrests and convictions contained in the PSI, which included the prior convictions for conspiracy to import marijuana and conspiracy to possess with intent to distribute marijuana contained in the government's information (Case No. 82-73-Cr-SMA), counsel for Sikes took the position that the "court should not take into consideration anything other than convictions." In advocating that the prior arrests should be stricken, Sikes' counsel argued that the PSI should only contain "the number of convictions that's referred to." Later in the proceeding, when the court referred to Sikes being convicted when he was out on bond, and spoke to a proposed doubling of Sikes' sentence, Sikes' counsel raised no objection. Not only did Sikes fail to object to the prior convictions contained in the government's information and in the

PSI, but, by implication, he agreed that the prior convictions stated in the PSI were correct. Thus, far from challenging the prior convictions, Sikes' counsel all but affirmed Sikes' previous drug convictions.

The convictions which formed the basis of the enhancement were none more than five years old. Sikes was convicted of conspiracy to import marijuana and conspiracy to possess with intent to distribute marijuana on January 31, 1983.[21] The government's enhancement information which relied on those convictions was filed on June 13 or June 17, 1988, more than five years after those convictions. As such, challenge to the validity of Sikes' convictions was barred

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[21] See Judgment and Conviction Order for defendant Thomas Sikes dated January 31, 1983, 82-73-Cr-SMA, Docket No. 1450. Sikes' conviction was affirmed by this circuit in United States v. Van Horn, supra.

by § 851(e).

> No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

A trial court is not required to adhere to the rituals of § 851(b) where a defendant, "as a matter of law, is precluded from attacking the conviction forming the basis of the enhancement information." United States v. Nanez, 694 F.2d 405, 413 (5th Cir. 1982), cert denied, 461 U.S. 909, 103 S.Ct. 1884, 76 L.Ed.2d 813 (1983). Thus the trial court's imposition of an enhancement sentence as to Sikes, pursuant to 21 U.S.C. § 851 would not, in any event, be subject to successful attack in this appeal even if that court had not done all it was required to do under the statute.

IX. CONCLUSION

For the reasons stated in this

opinion, the convictions and sentences of Sikes and Weaver are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-6032

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN WEAVER,

THOMAS D. SIKES,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING

(September 6, 1990)

BEFORE: KRAVITCH and JOHNSON, Circuit Judges, and KAUFMAN*, Senior District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant Sikes is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis A. Kravitch

United States Circuit Judge